Supreme Court, U.S.
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NO. 95-883

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

The West of England Ship Owners
Mutual Protection and Indemnity Association
(Luxembourg),

Petitioner,

v.

Stephen J. Morewitz,
as administrator, etc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. As to the jurisdiction of the court of appeals in the decision under review, the question is correctly stated as whether the Eleventh Circuit had jurisdiction, under 28 U.S.C. §1291, to act upon the Respondents' appeal from a final judgment of the District Court dismissing the case, with prejudice.

2. Whether the Eleventh Circuit correctly applied accepted principles of law as to waiver, when it found from undisputed evidence in the record that the Petitioner waived any right it may have had to arbitration with its own insured by failure to demand arbitration on any coverage issue for more than fifteen years after the sinking of the insured vessel, asserting a right to London arbitration only after a substantial change in British law occurring in 1990, to the prejudice of the Respondents.

3. In a novel issue not previously asserted by the Petitioner in the courts below, whether the Eleventh Circuit applied the appropriate federal admiralty choice of law principles to correctly hold that the forum state procedural laws should be applied to this action in aid of execution on a judgment.

PARTIES

The Petitioners have correctly identified the parties to this action.

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STATEMENT OF BASIS FOR JURISDICTION

The Respondents agree that the only basis for review of the September 6, 1995, decision of the Eleventh Circuit would be on a writ of certiorari under 28 U.S.C. §1254. However, there exists no conflict among the Circuits on any issue material to the result below, nor does the decision by the Eleventh Circuit involve issues which otherwise warrant the attention of this court.

STATUTORY PROVISIONS INVOLVED

The statutes and rules involved in the proceeding below and the issues asserted by the Petitioner include: Sections 3, 4 and 16 of the Federal Arbitration Act, 9 U.S.C. §§1-16; Registration of Judgments of the District Courts, 28 U.S.C. §1963; Rule 69 of the Federal Rules of Civil Procedure; Sections 27-23-1 and 27-23-2, Code of Alabama, (1975); and a British statute known as The Third Parties (Rights Against Insurers) Act of 1930.

STATEMENT OF THE CASE

The documents contained in the appendices to the Petitioner's brief are cited as [Pet. App. ___]. Certain documents not included in the Petitioner's appendices are appended as Respondent's Appendices and cited as [Resp. App. ___].

Because of the manner in which the District Court had organized its record, documents in the record but not contained in the appendices to the petition and this response are cited as follows. Discovery documents filed by the Respondents were placed into a record volume identified as Exhibit Folder 1, and referenced herein as [R. Exh. Folder 1-Page No.]. The

pleadings, briefs and orders filed in the District court record prior to the second appeal were placed into a record volume labelled as Exhibit Folder 2. References herein to those documents are as [R. Exh. Folder 2-Document No.]. Finally, documents in the District Court record after September 28, 1993, were placed into Record Volume One and referred to herein by [R.- Document No.]. Except for the West of England document entitled "IMBROS: FILE REVIEW" [R. Exh. Folder 1-29-34], these documents in the Record are not incorporated into the appendices to this brief, due to sheer volume. Should the Court request, Respondents will promptly file a separate appendix containing any such documents necessary to a proper disposition of the Petition for Certiorari.

(a) Statement of Proceedings Below

The Respondent, Stephen J. Morewitz, filed this action on June 26, 1985, as administrator of the estates of seven deceased seaman, seeking to collect a judgment for damages due their families as a result of their deaths in the sinking of the M/V IMBROS in 1975. The complaint, as amended on March 28, 1986, seeks to reach and apply the proceeds of a contract of marine P&I insurance issued by the Petitioner, the West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg), which covered the M/V IMBROS at the time of its sinking. The judgment at issue was entered by the United States District Court for the Eastern District of Virginia in 1980, and was registered in the Southern District of Alabama under 28 U.S.C. §1963.

In the amended complaint, the Respondents alleged that if British law should apply to the case, they had standing to pursue the direct action under the Third Parties' (Rights Against Insurers) Act of 1930, which was then interpreted by British case law as applying to P&I insurance agreements. In

the alternative, the Respondents asserted standing to pursue the direct action under Alabama Code §§27-23-1 and 27-23-2, which establish the procedure for the execution of judgments covered under insurance policies.

On June 29, 1988, the Southern District of Alabama entered an order dismissing this case for lack of subject matter jurisdiction. On an appeal by the Respondents, the Eleventh Circuit reversed, holding that the claim was within the admiralty and maritime jurisdiction of the District Court. *Morewitz v. West of England Ship Owners Mut.*, 896 F. 2d, 495 (11th Cir. 1990)(*Morewitz I*). The Court also found that the Respondents had standing to pursue the direct action against the insurer under Alabama law, as this court had approved in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).

The case was reinstated in the District Court on May 22, 1990, and on October 17, 1990, the Petitioner filed a motion to stay pending arbitration. Ultimately, the District Court entered an order on April 13, 1992, which granted the motion to stay.

The Respondents prosecuted an appeal from that stay order, which was docketed in the Eleventh Circuit as No. 92-6432. After briefing and oral argument, the Eleventh Circuit entered an unpublished opinion, *Morewitz II*, 5 F. 3d 1498 (11th Cir. 1993), on September 28, 1993, finding that it lacked jurisdiction to hear that appeal from an interlocutory order granting a stay of proceedings under §3 of the Federal Arbitration Act, 9 U.S.C. §1, et seq. [Pet. App. D]

After remand, the District Court entered orders requiring the parties to show cause that they are proceeding with arbitration or be dismissed. The Respondents filed a motion for relief from the stay order, which requested in the alternative that the court certify the question for appeal under

28 U.S.C. §1292. [Resp. App. A] However, on June 22, 1994, the District Court entered its order denying the Respondents' motion and also entered a judgment dismissing the action, with prejudice. [Pet. App. B]

On an appeal by the Respondents from that judgment of dismissal, the Eleventh Circuit entered the opinion under review, reversing the dismissal order and remanding the case to the District Court for further proceedings. *Morewitz v. West of England, 62 F. 3rd 1356 (11th Cir. 1995)(Morewitz III).*

(b) Statement of the Facts

Because of the dismissal orders entered by the District Court, no trial or evidentiary hearing has been held on the merits of the Respondents' cause of action. The underlying facts involved in the case are largely undisputed, drawn from the record in the Eastern District of Virginia, from documents produced in discovery, or admitted by the Petitioner in response to requests for admissions. The facts relating to the underlying casualty and the insurance dispute are recited in the opinions issued by the Eleventh Circuit.

The Casualty

The Respondents are the families of deceased seamen who were employed as members of the crew of the M/V IMBROS when it loaded with cargo in the port of Mobile, Alabama, and departed on December 18, 1975, bound for a port in Canada. After leaving Mobile, the vessel sank off of the East coast of the United States with all hands lost.

The Petitioner, West of England is a mutual insurance association engaged in the business of providing marine P&I insurance coverage to owners and operators of vessels. Prior

to the sinking of the vessel, West of England issued a contract covering the vessel, insuring against losses sustained by reason of claims and judgments for personal injuries and deaths occurring aboard the vessel. The contract was in full force and effect at the time of the sinking.

The West of England certificate on the M/V IMBROS named Imbros Shipping Co., Ltd., as owner of the vessel. However, Imbros Shipping was a shell company owned by George Tsourinakis, a Greek citizen. The vessel was operated and controlled by General Development and Shipping Enterprises Company, Ltd., which was another shell company owned and controlled by Mr. Tsourinakis. The interest of Mr. Tsourinakis, as well as of both companies, were all one and the same, according to the deposition testimony of Mr. Tsourinakis which was taken in Greece, in 1977. His testimony also confirmed that General Development exercised all of the incidents of ownership of the vessel, and that Imbros Shipping existed only as a nominal title owner. [R. Exh. Folder 2-20 ***] The fact that the M/V IMBROS was part of the General Development fleet was also known to West of England, according to documents produced in discovery, all of which was then insured by West of England. [R. Exh. Folder 1].

Virginia Litigation

Beginning in 1976, Morewitz, as administrator, filed suits in the Eastern District of Virginia on behalf of the families of eleven seamen killed in the sinking of the M/V IMBROS, including the seven families who are Respondents in the present case. The defendants named in the Virginia suits included Imbros Shipping and General Development, both of which were represented and defended in that action by the Petitioner, West of England, who employed attorney John Crumpler, a member of the Seawells firm in Norfolk, Virginia.

[R. Exh. Folder 2-21; Resp. App. D]

In January, 1977, more than two years before trial, the District Court dismissed Imbros Shipping, Ltd., for lack of personal jurisdiction. The court found jurisdiction over General Development, based on its ongoing business conducted in the state of Virginia. Thereafter, the Petitioner continued to represent and defend General Development in the Virginia suit. In addition, the attorney employed by the Petitioner in Virginia affirmatively represented that General Development was its insured. At the deposition of Mr. Tsourinakis taken in August, 1977, an attorney representing the Respondents asked whether there was an insurance agreement in existence which would satisfy all or part of any judgment obtained in the suit. Mr. Crumpler, the attorney employed by West of England, instructed his client not to respond and made the following statement:

> "As the plaintiff well knows, the West of England has a contract with Mr. Tsourinakis' vessels and in fact I am employed by West of England to represent the owner and we object to any further questions about insurance as being totally irrelevant." [Tsourinakis Deposition at page 20, R. Exh. Folder 2-20 ***]

West of England refused throughout the pendency of the Virginia action to respond to the plaintiffs' attempts to discover insurance coverage.

The Petitioner has attempted to incorrectly characterize the result in the Virginia court as ". . . essentially, a default judgment against General Development . . ." In actuality, the court entered a sanction order, after General Development failed to respond to discovery as to ownership and management

of the vessel. That order merely found that General Development was owner *pro-hac-vice* of the M/V IMBROS and prohibited it from offering in evidence any of the documents subject to the plaintiffs' discovery. That order was of little practical effect, given the admission by Mr. Tsourinakis in his deposition that General Development had exercised total control over the vessel. West of England also knew this, corresponding only with General Development (G.D.S.E.) regarding the casualty. [Resp. App. D]

The other orders entered by the Virginia court confirm that otherwise the case was hotly contested on its merits. Conspicuously absent from the orders included in the Appendix to the Petition for Certiorari is the order entered by the court on July 27, 1979, after a trial of the case on the question of liability. In this order, which is attached as Respondents' Appendix B, the court denied motions to dismiss based on *forum non conviens*, found that the vessel was unseaworthy causing the deaths of the seamen, and found that General Development was not entitled to limitation of liability. Among the many facts found by the court were the following:

> "(8) For some time prior to the loss, it was well-known to General Development that the saltwater cooling system for the Vulcan reduction gears of the main engines had been leaking at inaccessible locations. Panagiotis Grivas, who had been chief engineer aboard the IMBROS from January 12, 1975 until he was injured on September 10, 1975, testified that he had reported both to the master and to the office of General Development that there was considerable leakage under the Vulcan gears of the main engines; that such a repair job was difficult and required that the gears of the main

> engines had to be taken down and other pipes above had to be removed; and that this job required both time and team from a shore workshop.
>
> Third engineer, Katopodis, who left the IMBROS in Mobile in December just prior to its last voyage, agreed that there was leakage from the pipe lines of the cooling system and that the leakage was not repaired before IMBROS left Mobile on December 13." [Resp. App. at 11a]

The court found several other unseaworthy conditions existing aboard the vessel prior to its departure in Mobile, and found that those conditions caused the sinking. Based on this evidence, the order found liability on the part of General Development and ordered that the case be set for trial on damages.

After a trial on damages, the Virginia court entered its memorandum opinion on April 3, 1980 [Pet. App. I] dismissing the claims of four plaintiffs and awarding damages in favor of seven families who are the Respondents in the present case. The court also entered judgment on April 3, 1980, awarding damages to the Respondents totalling $459,456.36. [Pet. App. H]

After entry of judgment in the Eastern District of Virginia, Mr. Crumpler prosecuted an appeal by General Development to the United States Court of Appeals for the Fourth Circuit, which affirmed in an unpublished opinion, *Morewitz v. General Development and Shipping Enterprises Co., Ltd.*, 660 F. 2d 491 (4th Cir. 1981) [Resp. App. C] Mr. Crumpler also filed a petition for certiorari on behalf of General Development, which was denied, 454 U.S. 939 (1981).

The judgment entered by the Eastern District of Virginia in favor of the families of seven deceased seamen, the Respondents herein, was never paid.

Waiver

The documents comprising the contract of insurance coverage on the M/V IMBROS include the certificate of enrollment and the "Rules" of West of England. The "Rules" or coverage provisions do contain a clause calling for arbitration in the event that disputes " . . . arise between an insured Owner . . . and the Association . . . . " However, the seamen who died in the sinking of the M/V IMBROS were not parties to that insurance contract; neither were their families who are the Respondents herein.

The documents which were obtained by the Respondents through discovery in the present action, including the West of England document entitled "IMBROS: FILE REVIEW [Resp. App. D], disclosed a number of questions upon which West of England might have asserted a right to arbitration with its insureds. On September 16, 1976, West of England corresponded with General Development regarding "calls" or retroactive premium billings due on the M/V IMBROS. [R. Exh. Folder 1-115] On January 20, 1977, the Eastern District of Virginia entered an order dismissing Imbros Shipping, which West of England now contends was its named insured. [R. Exh. Folder 1-49] At various times during 1977, West of England advanced funds to its representatives, for the purpose of paying settlements on claims other than those filed in the United States, without demanding that its insureds first make payment of the claims in order to seek reimbursement. [R. Exh. Folder 1-36-42, 53-60] On July 6, 1977, General

Development sent a telex to West of England containing proposals for payments on hull and cargo coverages, payment of legal fees and expenses, and for credits against "calls" due on the M/V IMBROS. [R. Exh. Folder 1-116]

On August 24, 1978, the Southern District of Virginia entered an order denying the motion to dismiss General Development. [R. Exh. Folder 1-61] On September 28, 1978, West of England circulated an internal memorandum relating to continued defense of the Virginia suit as if all "calls" had been paid, relating to continued coverage by West of England of the General Development fleet, and regarding funds advanced by West of England to pay settlements in all of the claims other than those filed in the United States. [R. Exh. Folder 1-67]

On October 23, 1978, West of England circulated another internal memorandum regarding the withdrawal from coverage of the remainder of the GDSE fleet, the fact that General Development was then no longer in existence, and regarding the "calls" due from General Development or George Tsourinakis. [R. Exh. Folder 1-87] On March 15, 1979, West of England sent telexes to General Development questioning its coverage as an insured, but threatening withdrawal of coverage under other club rules if General Development did not cooperate with discovery. [R. Exh. Folder 1-88]

On March 23, 1979, John Crumpler, the lawyer employed by West of England to defend the Virginia action, filed a motion to withdraw, citing lack of cooperation by General Development in complying with discovery orders. [R. Exh. Folder 1-90] On March 26, 1979, the Virginia Court entered an order holding that General Development was the owner pro hac vice of the M/V IMBROS. [R. Exh. Folder 1-95] On April 16, 1979, the Virginia Court entered a bench

memorandum denying the Crumpler motion to withdraw, which contains the first reference in the court record reflecting any question of coverage of General Development under the West of England P&I contract. [R. Exh. Folder 1-99] The motion to withdraw and the Virginia court orders were forwarded by Crumpler to West of England. [R. Exh. Folder 1-90] As of July 1, 1980, West of England made payment of one of the expenses of Crumpler's defense of the Virginia suit. [R. Exh. Folder 1-109]

During 1979 and 1980, Freehill, Hogan and Mahar (New York Counsel for West of England) transmitted the orders from the Eastern District of Virginia finding liability and awarding damages, the notice of appeal filed by Crumpler, the Fourth Circuit's affirmance of the District Court judgment, the petition for certiorari and the denial of certiorari by the Supreme Court. [R. Exh. Folder 1-33, 34, 80; Resp. App. D] On May 13, 1980, West of England sent a letter or telex to Joseph M. Allen, Jr., counsel for Petitioners, advising him to anticipate a suit in Alabama to enforce the Virginia judgment, five years before the present action was filed. [R. Exh. Folder 1-33; Resp. App. D]

In July, September and October, 1980, and also in October and November, 1982, West of England received letters from representatives of the plaintiffs, demanding payment of the judgment entered by the Eastern District of Virginia. [R. Exh. Folder 1-81-85, 103-107] No response to these demands for payment has been produced by West of England.

Since the sinking of the M/V IMBROS in 1975, West of England has not demanded arbitration with its insureds on any issue. During the pendency of the suits filed in Virginia, West of England did not demand arbitration with any of these Respondents or their representatives. Since the filing of the

present action in the Southern District of Alabama in 1985, West of England has not served an actual demand for arbitration upon the Respondents or their counsel in this suit.

On June 2, 1990, the British House of Lords issued its decision in *Firma C-Trade S.A. v. Newcastle P&I Assn.*, and *Socony Mobil Oil, Inc. v. West of England Ship Owners Mutual Ins. Assoc. (London) Ltd.*, 2 Lloyd's R. 191 (H.L. 1190), holding that the British statute known as the Third Parties (Rights Against Insurers) Act of 1930 did not apply to marine P&I insurance agreements, overruling prior cases holding that the statute applied to give an injured party a direct action against the insurer for the indemnity due under the contract. On October 17, 1990, the Petitioner filed its motion in the Southern District of Alabama, requesting a stay pending arbitration.

REASONS TO DENY THE WRIT

I. The Eleventh Circuit correctly held that it had jurisdiction to act on this appeal from a final judgment of the District Court dismissing the case with prejudice, an appealable order under 28 U.S.C. §1291. Such jurisdiction gave the court the power to review and correct orders which had previously been interlocutory, including the erroneous arbitration order herein. On this point there is no conflict among the circuits.

Beginning in October, 1990, the Petitioner has maintained that it is entitled to London arbitration (although we do not know the basis on which West of England disputes this claim, since it has never tendered a demand for arbitration). The Respondents have maintained that they are not required to submit to arbitration because they have not agreed to arbitrate their entitlement to collect their judgment,

they are not parties to a contract to arbitrate, and the Petitioner has long ago waived any right to arbitration with its own insureds. The Respondents have also candidly advised the District Court and the Eleventh Circuit that a London arbitration would be futile because the House of Lords had changed British law in June, 1990, with the decision issued in *Firma C-Trade SA v. Newcastle P&I Assn.*, and *Socony Mobil Oil, Inc. v. West of England Ship Owners Mutual Ins. Assoc. (London) Ltd.*, supra. It was obvious to all involved that a London arbitrator would apply British law to hold that West of England would not have any liability until its defunct insured paid the judgment, an impossibility. See *Psarianos v. Standard Marine, Ltd., Inc., 12 F. 3rd 461 (5th Cir.), cert denied, 114 S. Ct 2164, U.S. (1994).*

In *Morewitz II*, the Respondents had pursued an appeal from the order staying proceedings pending arbitration. Although the Eleventh Circuit ordered briefs and oral argument on the issue, it concluded that the stay order was an interlocutory order upon which appeal is prohibited under §16(b) of the Arbitration Act. In the instant appeal the Petitioner argued that the case was in the same posture, urging the Eleventh Circuit to ignore the fact that a final judgment of dismissal with prejudice had been entered. The Eleventh Circuit correctly rejected this argument, finding that it had jurisdiction over the appeal and the issues presented:

> "Pursuant to 28 U.S.C. §1291 (1988), '[t]he court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.' Decisions of the district court are final if they 'end the litigation on the merits and leave nothing for the district court to do but execute

> the judgment'. *Thomson McKinnon Sec., Inc. v. Salter,* 873 F. 2d 1397, 1399 (11th Cir. 1989)(quotation omitted). 'A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment." *Nichols v. Mobile Bd. of Realtors, Inc.,* 675 F. 2d 671, 673 (5th Cir. Unit B 1982)(quotations omitted). We conclude that we have jurisdiction to hear this appeal." [62 F. 3d at 1361; Fn. Omitted]"

The entry of final judgment renders all previous interlocutory decrees in the case final and appealable. It is axiomatic that the entry of the judgment of dismissal, with prejudice, vested the court of appeals with jurisdiction to review the whole case, including the prior interlocutory order staying proceedings pending arbitration, under the provisions of Rule 54(a) and 58 of the Federal Rules of Civil Procedure, Rules 3 and 4 of the Federal Rules of Appellate Procedure, and also under the provisions of 28 U.S.C. §1291. See, *Moore's Federal Practice, ¶¶54.01-54.04, ¶110.13[1] and ¶110.25[2].*

The Eleventh Circuit was also correct in reaching a result in this case which is consistent with its decision in *State Establishment for Agr. Prod. Trading v. M/V WESERMUNDE,* 838 F. 2d 1576 (11th Cir. 1988). Although that case did come before the effective date of §16 of the Arbitration Act, it was decided under the admiralty law doctrine restricting appeals from a District Court's stay of admiralty proceedings pending arbitration, established by this court in *Schoenamsgruber v. Hamburg Am. Line*, 294 U.S. 454 (1935). As the Eleventh Circuit noted in *State Establishment*, the Schoenamsgruber Doctrine:

> ". . . provides that while proceeding in Admiralty,

> an order compelling arbitration and staying the action pending arbitration pursuant to 9 U.S.C., §§1-14 is:
>
> (1) Not a final order under 28 U.S.C. §225 (now §1291);
>
> (2) Not an injunction under 28 U.S.C. §227 (now §1292(a)(1)); and,
>
> (3) Not an appealable interlocutory decree under the present §1292(a)(3)." [838 F. 2d at 1579]

Thus, §16 of the Arbitration Act was essentially a codification of the Schoenamsgruber Doctrine, at least insofar as it could apply to the present case. *State Establishment* also makes clear the significance of a judgment dismissing the case with prejudice. The party who has foregone arbitration takes nothing if the arbitration order is found to be correct and the dismissal affirmed on appeal.

The decisions from other circuits argued by the Petitioner demonstrate only different results reached in cases in a different procedural posture, involving different facts than the present case. In *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F. 3rd 953 (10th Cir. 1994), the defendant had filed a motion for stay pending arbitration and the District Court simply entered the wrong order, dismissing the complaint and ordering the parties to proceed to arbitration under the terms of their contract. There simply was no dismissal with prejudice which would terminate the litigation if affirmed on appeal. Likewise in *Perera v. Siegel Trading Co., Inc.*, 951 F. 2d 780 (7th Cir. 1992), the case was in precisely the same posture as *Morewitz II*, in which no final order or judgment of dismissal had been entered.

The other cases argued by the Petitioner are simply

inapplicable to the issue herein. *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F. 2d 727 (4th Cir. 1991) involves an order for arbitration in a case filed under §4 of the Arbitration Act, which is appealable under §16(a)(3) of the Act. The Petitioner represented that the Fourth Circuit here "has rejected the Eleventh Circuit's approach." Instead, the case cited by *Stedor*, *Id.* at 731, as most directly on point supporting its conclusion is *Thomson McKinnon Securities, Inc. v. Salter*, 873 F. 2d 1397 (11th Cir. 1989), also followed in *Morewitz III*, 62 F. 2d at 1361.

The decisions in *Humphrey v. Prudential Sec., Inc., 4 F. 3rd 313 (4th Cir. 1993)* and *American Casualty Co. v. L-J, Inc.*, 35 F. 3rd 133 (4th Cir. 1994) merely discussed the differences between appealability as to interlocutory orders in cases governed by §4, as opposed to cases governed by §3 of the Arbitration Act. Neither involved the appealability of a final order of dismissal, with prejudice.

The Eleventh Circuit correctly recognized that the Respondents did not need to perform a futile act at great expense as a condition to appellate review of this arbitration order. There simply is no conflict among the circuits on this issue.

II. The Eleventh Circuit correctly applied accepted principles of law as to waiver, when it found from undisputed evidence in the record that the Petitioner had waived any right to arbitration with its own insured many years ago, to the prejudice of the Respondents. The case does not involve a mere failure to make a pre-litigation demand to arbitrate.

As it had done in the courts below, West of England continues in its petition to assert that its conduct with respect to its own insureds amounts to nothing more than a failure to

make a pre-litigation demand to arbitrate. The Petitioner also continues in its effort to direct the attention of the court away from the undisputed facts in this case.

We obviously are not dealing with a case in which an insurance company has made a timely demand for arbitration with its insureds as to a coverage question, at the first opportunity to do so, as was presented in *Psarianos v. Standard Marine, Ltd., Inc.*, 728 F. Supp. 438, 449-453 (E.D. Tex. 1989), arbitration award affirmed, 12 F. 3rd 461 (5th Cir. 1994), cert. denied, 114 S. Ct. 2743, U.S. (1994). Also, we agree with the statements made in that case and many others that mere delay in demanding arbitration does not, by itself, constitute waiver. However, the present action presents far more than an eight month delay between the filing of a suit and the demand for arbitration which was involved in *Tenaco Resins, Inc. v. Davey Intern., A.G.*, 770 F. 2d 416 (5th Cir. 1985).

The documents which the plaintiffs were able to obtain by discovery in the District Court clearly demonstrated that the conduct of West of England had amounted to much more than "mere delay" in asserting a claimed right to arbitration. [R. Exh. Folder 1; Resp. App. D] The Eleventh Circuit was acutely aware of the record in this case and pointed out that by the time the Petitioner filed a motion for stay pending arbitration (October 17, 1990) it had been fifteen years since the M/V IMBROS sank, and more than fourteen years since the original suits were filed in Virginia. It had been ten years since the entry of final judgment in Virginia and more than nine years since appeals to the Fourth Circuit and the Supreme Court were exhausted, and it had been more than five years since the filing of the present suit for the enforcement of the Virginia judgment. During all of that time, West of England had not tendered a demand for arbitration of any issue to Imbros Shipping, General Development, George Tsourinakis, the

administrator of the estates of the deceased seamen or their families, counsel representing the plaintiffs in Virginia and in Greece, nor to the counsel for Plaintiffs-Respondents in the present action. The Eleventh Circuit correctly recognized that the Petitioner had not made the slightest effort at demonstrating that it was "not in default in proceeding with such arbitration", the condition for issuance of a stay order under §3 of the Arbitration Act.

The undisputed facts contained in the record before the Eleventh Circuit are set forth in the statement of facts herein (*supra* at pp. 8-11) and will not be repeated here for the sake of brevity. Since the Petitioner has never served a specific demand for arbitration, nor has it filed an answer to the complaint in this case, we do not know which particular issues it might contend to be subject to arbitration in this case. However, the undisputed facts in the record before the Eleventh Circuit demonstrated that West of England passed on many opportunities to request arbitration with its own insureds, dating back to the sinking of the M/V IMBROS twenty years ago.

As to the Respondents themselves, the Petitioner's opportunities to request arbitration did not commence with the 1985 filing of the present suit, nor with the 1990 remand to the District Court from the initial appeal in this case. Beginning in 1980, American lawyers and a London Solicitor representing the Petitioners made numerous demands directly to West of England for payment of the judgment rendered by the Eastern District of Virginia. These demands were repeated in 1982. The Petitioner did not request arbitration with the Petitioners then, or at any other time. Instead, the Petitioner simply ignored these requests and instructed its local attorneys to be prepared for possible action by Morewitz in Alabama in 1980. [Resp. App. D]

The Eleventh Circuit recognized that it was dealing with an insurance company which had clearly sat on its rights for fifteen years, and had done so because it would have had no advantage in a London arbitration, given British law in effect at the time. The Eleventh Circuit also correctly recognized that the Respondents were clearly prejudiced by this delay:

> "In light of the strong federal policy favoring arbitration, we also must examine whether Morewitz has been prejudiced by West of England's delay in demanding arbitration. The House of Lord's decision affecting Morewitz's right to arbitrate this dispute in England was not announced until nearly a decade after the Fourth Circuit affirmed General Development's liability for the crew members' deaths. *Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n.*, 2 Lloyd's Rep. 191 (H.L. 1990). Moreover, Morewitz instituted the present lawsuit in 1985, five years before the decision from the House of Lords. We conclude that West of England had ample opportunity to demand arbitration well in advance of the decision that significantly changed the legal position of the parties to the prejudice of Morewitz." [62 F. Supp. at 1366]

In so holding, the Eleventh Circuit reached a fact-specific decision based upon principles of law which are totally consistent with the decisions of other circuits.

Contrary to the assertions of the Petitioner, given the undisputed facts before the Eleventh Circuit, the result is hardly a decision which ". . . robs the parties to an arbitration agreement of the certainty that the Act was designed to provide and which is essential in international transactions." Given the

fact-specific inquiry required by the principles of waiver and estoppel, the Eleventh Circuit decision is also clearly not a ". . . frontal assault upon the philosophical underpinnings of the Arbitration Act . . . "; nor is this decision at odds with the principles of law applied by other circuits in cases involving different facts.

For that reason, the Petitioner's reliance on *General Guaranty Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F. 2d 924 (5th Cir. 1970), is misplaced. In that case, the defendant had asserted a right of arbitration at its earliest possible opportunity, in the first pleading filed in response to the complaint. The Fifth Circuit held:

> "[New Orleans General Agency] did not lose its rights to arbitration by pleading alternatively that the contract had been abandoned and that court proceedings should be stayed pending arbitration. The propriety and desirability of having an initial judicial determination of whether an arbitration contract exists is well recognized." [427 F. 2d at 928]

The court further found no prejudice to the party opposing arbitration, an essential element of waiver.

Likewise, in *Lubrizol Intern., S.A. v. M/V STOLT ARGOBAY*, 562 F. Supp. 565 (S.D.N.Y. 1982), the District Court found that there had been conduct inconsistent with the right of arbitration, by the party seeking a stay order. The court also found that there had been no prejudice, and therefore no waiver of arbitration, because it is "the presence or absence of prejudice which is determinative of the issue." *[Id.* at 573]. Further, the decisions in *Stifel Nicholaus & Co., Inc. v. Freeman*, 924 F. 2d, 147 (8th Cir. 1991), and *Southside*

Internists Group v. Janus Capitol Corp., 741 F. Supp. 1536 (N.D. Ala. 1990), each involved timely requests for arbitration and an absence of prejudice to the opposing party. Those decisions are totally consistent with the Eleventh Circuit in the present case.

The mere fact that other courts have reached different results, based upon different facts, is far from a conflict among the circuits which would warrant the attention of this court.

III. Under appropriate Federal admiralty choice of law principles, the Eleventh Circuit correctly held that state procedural law should be applied to this action in aid of execution on a judgment.

In a novel issue not previously raised in the courts below, the Petitioner now argues that the Eleventh Circuit should be held in error for an alleged failure to apply federal admiralty conflict rules which determined whether United States substantive law may be applied to the claim of an injured seaman, citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953). These substantive choice of law principles determine, for example, whether the Jones Act, 46 U.S.C. §688, may be properly applied in the injury claim of a foreign seaman. Interestingly, the Petitioner's lawyer representing General Development in Virginia lost on this issue in his appeal of the original judgment to the Fourth Circuit. [Resp. App. C] While properly applied in the underlying suit, these substantive choice of law principles are themselves foreign to a proper analysis of whether state law should be applied in a direct action against an insurance company in a suit in aid of execution on a judgment.

It is obvious that the Eleventh Circuit did apply the proper analysis in determining that the Respondents had standing to pursue their claim against the Petitioner under Alabama law, a point which was essentially unchallenged in the

courts below. In *Morewitz I*, the Eleventh Circuit made note of the Petitioner's reference to British law, in a passage which was quoted in substantial part in *Morewitz III*, 62. Fd. at 1363, and correctly set out the proper choice of law analysis:

> "But we are not so sure that an extended inquiry into choice of law rules would show that the English statute is applicable. Although it seems clear that English law would govern in construing the existence and amount of defendant's liability under the marine insurance contract, it is not as clear, when the suit is being brought in Alabama, that English procedural law would apply. The cases were have reviewed, although not addressing the choice of law issue directly, indicate that the forum state's law may be the applicable law for purposes of applying any direct action statute. See E.B. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S. Ct. 608 98 L. Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F. 2d 1485 (11th Cir. 1986), modifying 747 F. 2d 689 (1984); *Nebel Towing*, 419 F. 2d 230; *Aetna Casualty, supra; Fidelity & Casualty, supra; Ingram Indus, supra,* at 1301 quoting *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So. 2d 875 (1946)); *See also Wilson Boat, supra* (discussing marine insurance in general); *Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.*, 757 F. 2d 1172, 1174 (11th Cir. 1985) (same).
>
> Thus, the choice of law question could conceivably affect plaintiff's standing, and consequently, the Court's Article III power to decide the case. See U.S. Const. Art. III, §2. We need not concern ourselves with it now, however, *as plaintiff has also alleged that he has standing under Alabama law should it apply, see Plaintiff's Amended Complaint, Rec. 25, at 28 (referring to Ala. Code §§ 27-23-1 to -2), and as defendant has not seen fit to*

argue otherwise." [896 F. 2d at 499-500, Fn. 5; emphasis added]

In *Morewitz III*, the Eleventh Circuit also applied the proper choice of law analysis to determine that the procedural law of the forum state properly applied to this suit in aid of execution on the judgment:

> "Federal admiralty law neither authorizes nor forecloses a third party's right to directly sue an insurance company. *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F. 2d 1485, 1487 (11th Cir. 1986), *modifying* 747 F. 2d 689 (1984). 'A state may, however, create a direct action against a maritime insurer, at least where the state action is not in conflict with any feature of substantive admiralty law or any remedy peculiar to admiralty jurisdiction.' *Steelmet*, 779 F. 2d at 1487; see *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21 75 S. Ct. 368, 374, 99 L. Ed. 337 (1955) (in the absence of a controlling federal admiralty principle, state law can be applied in an admiralty case). The conflict in the present case lies not with the federal admiralty law, but with whether the English bankruptcy statutes or the Alabama direct action statutes apply.
>
> We recognize that characterizing direct action statutes as either procedural or substantive is problematic, particularly in the context of admiralty jurisdiction. *See State Towing Corp. of India v. Assuranceforeningen Skuld*, 921 F. 2d 409, 414-15 (2d Cir. 1990). 'However, in order to promote orderly administration of justice and the integrity of courts' local rules, some laws are deemed procedural and not subject to choice of law rules.' *Id* at 416; *see also* Restatement (Second) of Conflict Laws §122 emt. a (1971) (discussing a state's right to apply its

> own procedural law). Therefore, '[b]efore engaging in choice of law analysis, we first address [the] argument that [Alabama's] direct action statute is procedural and therefore not subject to choice of law rules.' *State Trading*, 921 F. 2d at 414" [62. F. 3rd at 1362-1363; footnotes omitted]

The Petitioner argues that a conflict among the circuits is demonstrated by comparing the result in this case with the decision in *State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F. 2d, 409 (2nd Cir. 1990). In so doing, the Petitioner ignores the fact that *State Trading* was dealing with a Connecticut statute, which the Connecticut courts had interpreted as substantive, rather than procedural. *Id* at 415-416. The Eleventh Circuit recognized this and also recognized that the courts of Alabama have uniformly construed Alabama Code §§27-23-1 and 27-23-2 to be procedural in that it "merely enables the person suffering the initial damages out of which grows the loss to the insured, to acquire a lien against the loss and the right to damages or indemnity arising under the policy, and to enforce it in his own name." *Macey v. Crum*, 249 Ala. 249, 30 So. 2d 666, 668 (1947). See also, *Fleming v. Pan American Fire & Cas. Co.*, 495 F. 2d 535 (5th Cir. 1974), another case which is totally consistent with the result below and which also does not create the conflict among the circuits alleged by the Petitioner.

State Trading is simply another case in which different facts have mandated different results. In arguing a conflict among the circuits, the Petitioner avoids mention of the fact that the parties to the underlying judgment in *State Trading* had absolutely no contact with the state of Connecticut. The vessel had not been in the state, neither the vessel owner nor the cargo shipper had done business in the state, and the vessel was not on a voyage to or from a port in Connecticut when it sank

off the coast of Africa. In the absence of any conduct in the state the Second Circuit declined to apply Connecticut law.

In *Morewitz*, to the contrary, the M/V IMBROS had called upon the port of Mobile, Alabama, before commencing its final voyage. The vessel was insured by West of England while in that port and when it departed. Multiple acts of negligence on the part of the owners and operators of the vessel, occurring in the port of Mobile, Alabama, were the basis for the denial of limitation of liability and also the basis for the award of damages against General Development. Indeed, given the numerous unsafe conditions found by the Eastern District of Virginia [Resp. App. C] it is a mere happenstance that the vessel managed to escape state territorial waters before sinking.

There is absolutely no question that the Southern District of Alabama would have had jurisdiction and venue in the original suit against Imbros Shipping and General Development. Likewise, there is no question but that the District Court has jurisdiction now to enforce the judgment which has been registered in the Southern District of Alabama under 28 U.S.C. §1963, which provides that the judgment shall be enforced in like manner as a judgment of the District Court. Rule 69 of the Federal Rules of Civil Procedure specifically provides that the District Court shall apply the practice and procedure of the state in which the District Court is held, to an action in aid of execution on a judgment such as the present case.

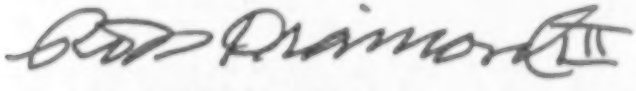
There is also no question as to in personam jurisdiction over the Petitioner itself. West of England relishes in referring to itself as a "Luxembourg" corporation, but fails to disclose that it conducts its insurance business by agents and attorneys on a daily basis in Mobile, Alabama, and has done so for decades.

The application of state law to allow the Respondents standing to pursue this direct action to reach and apply the proceeds of the insurance contract, in aid of execution on their judgment, is totally consistent with the decisions of this court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), and *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954). The choice of law principles applied by the court below are likewise consistent with the standards applied in other circuits.

CONCLUSION

There being no conflict among the circuits on any issue material to the result below, nor any other issues herein which otherwise warrant the attention of this court, the petition for writ of certiorari should be denied.

Respectfully submitted,



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